

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARINA DACER, SABINA DACER-  
REYES, AMPARO DACER-HENSON,  
and EMILY DACER-HUNGERFORD,

Plaintiffs,

v.

JOSEPH EJERCITO ESTRADA,  
individually and in his official capacity,  
PANFILO M. LACSON, individually and  
in his official capacity, REYNALDO  
“BUTCH” TENORIO, individually and in  
his official capacity, DANTE TAN,  
individually and in his official capacity,  
MICHAEL RAY AQUINO, individually  
and in his official capacity, VICENTE  
ARNADO, individually and in his official  
capacity, GLENN DURLAO, individually  
and in his official capacity, and  
DOES 1–100, inclusive,

Defendants.

No. C 10-04165 WHA

**ORDER DENYING  
MOTION TO DISMISS  
AND VACATING HEARING**

**INTRODUCTION**

In this action for torture and extrajudicial killing in the Philippines, defendant Michael Ray Aquino moves to dismiss the complaint. For the following reasons, his motion is **DENIED**.

**STATEMENT**

Salvador “Bubby” Dacer allegedly was a prominent and influential publicist in the Philippines until he was tortured and killed in November 2000 (Compl. ¶¶ 21, 54–58). Dacer’s

1 children bring this action under the Alien Tort Claims Act and the Torture Victims Protection Act  
2 against seven individuals they believe are responsible for their father's torture and death.  
3 According to the complaint, Dacer's death was orchestrated by high-ranking members of the  
4 Joseph Ejercito Estrada administration who perceived Dacer as a threat to their political power.  
5 Defendant Michael Ray Aquino now moves to dismiss the complaint because plaintiffs  
6 supposedly have not exhausted their legal remedies in the Philippines (Dkt. Nos. 12, 20).  
7 Plaintiffs oppose (Dkt. No. 23).

### 8 ANALYSIS

9 Exhaustion is an affirmative defense. Where claims are brought under the Alien Tort  
10 Claims Act, "[t]he defendant bears the burden to plead and justify an exhaustion requirement,  
11 including the availability of local remedies." *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832  
12 (9th Cir. 2008). Here, defendant Aquino has not pled exhaustion as an affirmative defense in an  
13 answer to the complaint; he instead raised the issue in a motion to dismiss the complaint. This  
14 procedural approach is improper.

15 Moreover, the question of exhaustion depends on disputed factual matters outside the  
16 ambit of the pleadings. The scope of legal remedies available in the Philippines, the effectiveness  
17 of those remedies, and the extent to which plaintiffs have pursued them are questions that will be  
18 better answered with the benefit of a full factual record developed through discovery. Other  
19 factual circumstances inform the prudential decision whether to even impose an exhaustion  
20 requirement on a particular claim under the Alien Tort Claims Act. *See Sarei*, 550 F.3d  
21 at 827–32.

22 Defendant Aquino should file an answer to the complaint raising exhaustion as an  
23 affirmative defense. After both sides have an opportunity to develop the evidence needed to  
24 prove and rebut the exhaustion defense, defendant Aquino then may file a motion for summary  
25 judgment on that issue.

### 26 CONCLUSION


27 For the foregoing reasons, defendant Michael Ray Aquino's motion to dismiss the  
28 complaint is **DENIED**. This is without prejudice to defendant Aquino pleading exhaustion as an

1 affirmative defense in an answer to the complaint and later arguing the issue based on an  
2 evidentiary record on summary judgment or at trial. Defendant Aquino must file his answer to  
3 the complaint by **SEPTEMBER 9, 2011**.

4 The motion hearing previously set for 8:00 a.m. on September 1, 2011, is **VACATED**. The  
5 case management conference set for 11:00 a.m. on September 1, 2011, will go forward  
6 as planned.

7  
8 **IT IS SO ORDERED.**

9  
10 Dated: August 17, 2011.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE